SUPREME COURT OF KENTUCKY
FILE NO. 2014-SC-000472
(COURT OF APPEALS FILE NO. 2011-CA-972)

DEVLIN BURKE — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HON. PATRICIA M. SUMME, JUDGE
INDICTMENT NO. 2010-CR-00563

COMMONWEALTH OF KENTUCKY — APPELLEE

BRIEF FOR APPELLANT, DEVLIN BURKE

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CERTIFICATE REQUIRED BY CR 76.12(6):

The undersigned does certify that copies of this Brief were mailed, first class postage prepaid, to the Hon. Patricia M. Summe, Chief Circuit Judge, Kenton County Justice Center, 230 Madison Avenue, Suite 601, Covington, Kentucky 41011-1539; the Hon. Stefanie L. Kastner, Commonwealth Attorney's Office, 303 Court Street, Suite 605, Covington, Kentucky 41011-1639; the Hon. Ameer Mabjish, Department of Public Advocacy, 333 Scott Street Boulevard, Suite 400, Covington, Kentucky 41011-1534, and to Hon. Jeffrey Allan Cross, Assistant Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, Kentucky 40601 on July 23, 2015. The record on appeal has been returned to the Kentucky Supreme Court.

Kathleen K. Schmidt

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Introduction

Devlin Burke appeals from his convictions for three counts of assault second degree, one count of assault fourth degree and PFO second degree in Kenton Circuit Court, for which he received a total 17 year sentence. His crimes were also designated as hate crimes.

Statement Concerning Oral Argument

Appellant requests oral argument in this case because of the number of issues, the complexity of the case and the interpretation of the hate crime statute.

Citations to the Record

The record consisted of three volumes of Transcript of record cited as TR pg. There are also five videotapes and one CD. These are cited as VR date; hh:mm:ss.

Statement of Points and Authorities

Statement of the Case

On August 15, 2010, in Covington, Kentucky, Appellant Devlin Burke and his cousin Erica Abney were passengers in a white Pontiac driven by Charles Clark. Burke had been in a serious motorcycle accident on August 8. He broke his cheek bone, the orbital bone around eye, and had multiple head fractures, and a severe concussion. He had major surgery on his face on August 10 and felt terrible. VR 3/17/11; 11:05:15, 11:06:26, 11:13:30. He was only out that night to meet Lisa Allen for a loan. Id., 11:16:00. However, Erica wanted to stop at a bar. Id., 11:18:45. The group ran into Tim Searp and his girlfriend, Pam Keller, at Mr. T.'s. Id., 11:19:00. Then all five friends got back in the white car which was parked at the Shell gas station lot. Id., 10:27:55, 11:19:55.

A group of partiers coming from a housewarming walked through the Shell parking lot in three different groups. Katie Meyer, Connie Kohlman, Jack Coffer, Chris and Christa were in the first group. Dee Sprague and Ondine Quinn were in the second group and Julia and Will were about 15 feet behind them. VR 3/15/11, 13:34:00.

Clark's car started backing up as Dee and Ondine were walking behind it. Ondine rapped on the car several times. Id., 13:36:36; VR 3/17/11; 10:28:15, 11:20:35. Erica, then Pam, got out of the car and Erica "mouthed off." Id., 10:28:40, 10:35:00. Clark heard cussing- the women were saying stuff to Erica too- then it got chaotic. Id., 10:28:45, 10:34:30, 11:20:50, 11:23:00. Dee she and Ondine turned around when two women were in the passenger window, shouted horrible things. Id., 13:38:10.

Tim Searp got out and chased Ondine around the corner to where the rest of her friends were. *Id.* Dee said Erica and Pam were out of the car shouting awful things, and approached her aggressively. Id., 13:41:15. Burke got out of the car, in a tank top with numerous visible tattoos, a large black eye. Id., 13:42:50. Burke testified he tried to get Erica to calm down and get back in

the car so they could leave. VR 3/17/11; 11:22:35. An aggressive, heated argument began between Abney and the other two women. It was very chaotic to him. Id.; 11:20:35. Clark also tried to get Erica in the car and thought Tim, Pam, Burke and Erica got back in, then everyone was gone. Id., 10:29:00.

As Burke was trying to talk to Erica, people leaving the bar came from around the corner. VR 3/17/11; 11:23:20. A bunch of people were gathering and arguing. Id., 11:24:20. He went into the crowd to get Erica away and the other woman's friends were trying to pull her[1] back. Id. The crowd was moving across the parking lot. Burke never made any homophobic comments. Id., 11:25:15. He never participated in any assault with Tim and never hit or kicked Katie. Id., 11:23:30.

Dee claimed that as Burke slammed the car door, he said, "Fucking dykes." Id., 13:46:25. He then approached swiftly, and followed Searp around the corner. As he did so, Dee heard him say, "You're gonna run." Id., 13:46:39. Burke made no other derogatory comments to her and her friends at this point. Id., 13:47:10. Pam and Erica were still shouting and the men were running. Id., 13:47:20. However, Clark said he did not hear Burke or anyone in his group except Erica in his group say anything. VR 3/17/11; 10:29:10.

Dee went around the corner of a building down Pike Street and saw Connie Kohlman alone, partially on the ground, crying. VR 3/15/11, 13:48:50. Dee's friends were already three buildings down the street near the Yada Club, pointing and shouting at her. Id., 13:49:30. Tim Searp admitted he assaulted Connie; he said Burke was not involved. VR 3/17/11; 09:19:10, 09:21:15. Dee was looking for Katie Meyer.

Katie and Connie heard yelling and commotion at the Shell gas station after they had gone around the corner at Pike Street, and Katie ran back and saw Ondine run past and Dee standing there with two women physically close to her, yelling in her face. VR 3/15/11, 14:40:00, 15:05:45,

[1] By default, this was Ondine since it was not any of the women who testified. VR 3/17/11; 12:02:10.

15:06:10, 15:07:05. Connie testified Tim Searp confronted her, "Do you want a piece of me?" Id., 14:41:45 et seq. Searp slapped her cheek and she assumed Searp held her by her hair and pushed her head against the wall repeatedly; she was then kicked repeatedly. Id., 14:42:25.

Katie said as the men ran by her, she heard Burke say, "Fucking dykes, clit lickers." Id., 15:10:45. Katie heard screaming and ran and saw Burke kicking Connie Kohlman. Id., 15:08:05. Katie jumped on top of Connie and someone kicked her in the back. Id., 15:11:40. When she turned only Burke was there. Dee saw Burke standing on top of them with his arms up and fists clenched. Id., 13:49:50. Katie hit Burke in the shin with a wine bottle. Id., 13:51:00.[2] Dee said Burke looked up and saw two dozen people gathered at the alley across Pike Street across from the gas station. Id., 13:51:50. Dee said there was tons of shouting, yelling and people running around. Burke ran across street towards the crowd of people. Id., 13:52:45, 14:08:02.

Then a white van driven by James Patton, and carrying Jessica Ladd, Justin Sizemore and Preston Akemon (a juvenile) pulled into Shell. VR 3/16/11; 09:14:45. Katie told the strangers in the van they needed help. VR 3/15/11; 13:53:50, 13:54:20, 15:12:55. Patton heard screaming so they stopped. VR 3/16/11, 09:15:20. There was commotion and screaming from Pike Street. Id., 08:33:33. They also stopped because Sizemore mistakenly thought he recognized a friend. VR 3/16/11; 11:37:50. However, Jessica thought she recognized Pam Keller. Id., 09:16:40, 08:12:26. When the van pulled into the gas station, she saw Pam and her friends go to the other side of the lot towards the people they were arguing with on Pike Street. Men and women were arguing. Id., 9:13:35. She heard screaming and commotion from Pike Street. Id., 9:33:33. Jessica also saw Burke in a group that had run back to the gas station property- he looked "mad." Id., 9:16:05.

[2] In her statement to Detective Ewell, Meyer said the man in the white tank assaulted both her and Connie. VR 3/15/11; 15:25:30. Even though she identified Burke at trial, all agree Searp had on the white tank and Burke's was gray. Before she had lunch with Connie, she gave a second written statement to police saying she only saw one man run by. Id., 15:28:10.

Patton had a homemade hammer-named Thor- made from an 18 pipe with a 3 pound steel block welded on it in his van. Akemon had a knife.

Burke testified he was trying to walk back to the car when Chris Pfeiffer, running from the bank lot to Pike Street, approached him wanting to fight and saying, "What's up, what's up." VR 3/17/11; 11:26:25. Another man also wanted to fight. Burke told them they better get away from him and turned to leave. The three men from the white van got out and came towards him- Patton had a hammer raised over his head, Akemon had a knife, the third was a big guy; they were yelling at him and he did not know why. Id., 11:27:05, 11:29:10. Burke pulled his brown knife out of his pocket. Id., 11:27:50. He was scared; he thought he was going to get hit. Id., 11:29:10, 11:29:55. He heard someone behind him and Pfeiffer tackled him. Id., 11:30:20. Burke saw the guy with the knife try to slice at him so he cut Pheiffer behind the neck. Id., 11:31:30. Burke swung again and hit Akemon in the arm and Akemon dropped the knife. Id., 11:31:15.

Akemon made a "hole" as he ran; Burke ran the same way. Patton raised the hammer. Burke feared being seriously injured or killed if he got punched in the side of his injured face.Id.,11:32:30, 11:35:00. Burke sliced Patton in the side before Patton could swing. Id., 11:33:05. He ran towards the car and threw the knife down. Id., 11:33:25. He used a knife because he was trying to avoid injury. Id., 11:34:03. Burke denied cutting the men in a statement to the police, because he was raised not to trust the police. VR 3/17/11; 11:03:20, 11:05:40.

Pfeiffer, Sizemore, Patton and Akemon's stories differed from Burke's. Pfeiffer, a convicted felon, was in the bank parking lot when he heard screaming and ran towards Pike Street, stopping by a gate. He saw a two dozen of screaming and fighting in the middle of Pike Street but did not know the people involved. VR 3/15/11; 15:40:25 et seq., 16:01:40. He saw "a bunch of chaos" in front of him. Id., 15:03:25. Burke left his friends, ran up, swung at him as Pfeiffer ducked, and stabbed him in the back part of his neck. Id.,15:44:10, 15:47:07, 16:21:05. Burke said nothing to him. Id., 16:07:49. This was a surprise- it was out of the blue and

unexpected- and Pfeiffer did not provoke it. Id., 15:48:27. Pfeiffer took his shirt off but thought it was after he was cut, not before. Id., 16:02:35. Pfeiffer never saw anyone get out of the white van. Id., 16:21:40.

Sizemore got out of the van and saw a whole bunch of other men and women who came from the bar area. Id., 11:40:18. Patton saw Burke and Searp chasing Sizemore. VR 3/16/11, 09:17:50, 09:18:10, 09:19:45. Patton said Burke swung at Sizemore. Id., 09:21:47. Patton got out and looked at all three men and said, "It ain't got to be this way." Id., 09:22:35, 09:24:25. Patton said he was unarmed. Sizemore said Searp tried to hit him, then he tried to hit Searp. Id., 11:42:50. They both had nasty words for each other. Id., 11:46:15. Burke went after Patton and cut him. Id., 11:44:00. Sizemore said he saw Burke reach around into the van where Akemon was. Id., 11:45:05. Sizemore also said Burke chased Sizemore across the street, cutting his pants four to five times. Id., 11:46:45. Sizemore admitted he stopped in the middle of the street and punched Burke once. Id., 11:49:45. Sizemore said Burke threw his knife at him, then turned around and walked back. Id., 11:49:05.

Burke swung at Patton and cut him on his side. Id., 09:24:55, 09:25:48. Patton saw nothing in Burke's hands. Id., 09:25:00. Patton pulled out Thor. Id., 09:26:35, 09:27:45. He circled around the van to find Burke and try and hit him with Thor. Id., 09:29:45. Burke was chasing Sizemore. Id., 09:30:45. Patton got Burke's attention and Burke came back to him with something shiny in his hand. Patton raised the hammer and yelled "back off." Id., 09:32:40, 09:33:40. His intent was to hit him Burke if he came at him. Id., 09:34:00.

Akemon testified Burke was yelling, but the bigger guy, the one without the tattoos [Searp], was the one yelling homophobic slurs. Id., 10:01:20, 10:20:40. Akemon said Burke ran up on the van and swung at him with the knife then ran off. Id., 10:04:25. Akemon was holding knife with a three inch blade dropped it when he got cut. Id., 10:05:00, 10:11:05, 10:22:35.

Akemon got out of the van and saw Sizemore running with Burke behind him, cutting his pants with the "little knife" he had. Id., 10:05:20, 10:20:17.

Sizemore swung at Burke, hit him once in the eye, then jumped the fence and kept running. Id., 10:05:40. Akemon told the police he saw Patton and Sizemore chasing Burke around. Id., 10:24:03.

Dee Sprague said Burke was still across the street when she first saw him with the knife. He started crossing the street towards them, made a "crazy move" where he slashed the knife in the air like an X. He was walking towards the car where Katie was. Because she feared for Katie, Dee got between Burke and Katie, put both her hands on his chest and tapped him as a distraction. VR 3/15/11; 13:55:54. Burke's eyes were on her but were also wild, spinning around, looking at everything. Id., 13:58:35. Dee said "OK, we're done, I'm cool, you're cool" and even though he had the knife, he seemed to calm down. Id., 13:59:05. After Dee yelled "he's got a knife!" everyone ran and Burke started walking aggressively towards Katie as did a woman with blond hair but the police arrived. Id., 14:01:00. The whole incident lasted 10-15 minutes. Id., 14:02:15, 15:14:15.

The Court of Appeals affirmed Burke's convictions. *Derlin Burke v. Commonwealth*, _____S.W.3d._____ (Ky. App. rendered July 18, 2014) (to be published).

ARGUMENT

1. Hate Crime Statute is Unconstitutional; the Assaults were not Hate Crimes.

Preservation: The Commonwealth filed a motion for a hate crime finding based on sexual orientation under KRS 532.031. TR 245-246. Burke filed a motion objecting and moving the court to find the hate crime statute unconstitutional under the 5th, 6th and 14th Amendments to the federal constitution and Sections 7 and 11 of the Kentucky Constitution. TR 247-259. The court found the statute was constitutional and that all four crimes were hate crimes. VR 1:

5/17:11; 09:03:40-10:09:50. Written findings were made in the judgment. TR 267-8. See Appendix Tab 2.

A. The Hate Crime Statute-

The hate crime statute contained in KRS 532.031 was enacted in 1998.[3] That statute states:

> (1) A person may be found by the sentencing judge to have committed an offense specified below as a result of a hate crime if the person intentionally because of race, color, religion, sexual orientation, or national origin of another individual or group of individuals violates a provision of any one (1) of the following:
> (a) KRS 508.010, 508.020, 508.025, or 508.030;
> (b) KRS 508.050 or 508.060;
> (c) KRS 508.100 or 508.110;
> (d) KRS 509.020;
> (e) KRS 510.040, 510.050, 510.060, 510.070, 510.080, 510.090, 510.100, or 510.110;
> (f) KRS 512.020, 512.050, or 512.060;
> (g) KRS 513.020, 513.030, or 513.040; or
> (h) KRS 525.020, 525.050, 525.060, 525.070, or 525.080.
> (2) At sentencing, the sentencing judge shall determine if, by a preponderance of the evidence presented at the trial, a hate crime was a primary factor in the commission of the crime by the defendant. If so, the judge shall make a written finding of fact and enter that in the court record and in the judgment rendered against the defendant.
> (3) The finding that a hate crime was a primary factor in the commission of the crime by the defendant may be utilized by the sentencing judge as the sole factor for denial of probation, shock probation, conditional discharge, or other form of nonimposition of a sentence of incarceration.
> (4) The finding by the sentencing judge that a hate crime was a primary factor in the commission of the crime by the defendant may be utilized by the Parole Board in delaying or denying parole to a defendant.

Burke's objections to the hate crime designation fall within several categories.

B. No sufficient proof or adequate judicial findings that any of the four assaults were committed "as a result of" hate crimes, i.e. that Burke intentionally committed the assaults "because of" the victims' sexual orientation, or that hate crimes were the "primary factor" for the assaults. Statute unconstitutionally vague and overbroad as applied.

The statute lists three distinct findings within two sections of the statute that must be made by the trial court pertinent to this case- 1) Burke committed "an offense" specified "as a

[3] It was amended in 2000 to add assault fourth degree.

result of a hate crime," 2) "if [Burke] intentionally because of … sexual orientation … of an individual or group of individuals" violated "a provision" of KRS 508.020 and 508.040; **and** 3) "a hate crime was a primary factor in the commission of the crime by [Burke]".

No burden of proof is explicitly assigned to the first findings in Section 1 of the statute. Burke argues in Section E, *infra*, that a jury must decide these issues beyond a reasonable doubt. But if this Court does not agree, at least the preponderance standard must be utilized. Burke asks this Court to clarify this. The legislature employed that standard in relation to the question of whether the hate crime was the primary factor for the offense. It makes sense the legislature also meant it to apply to the questions the trial court must find in Section 1. Defense counsel argued the standards for proof should be consistent. VR 5/17/11; 9:24:10. It would make no sense for a judge to use a lesser standard in determining the critical evidentiary question of whether the defendant acted intentionally because of the characteristic of the individual subjected to the crime in the first place than deciding if that was the primary factor for the offense.

1. Burke did not intentionally violate the assault second and fourth degree statutes because of the sexual orientation of an individual or individuals and as a result of that intention- KRS 532.031 (1).

A). *No sufficient evidence any of the offenses were committed* ***as a result of*** *Burke acting* ***intentionally*** *because of any of the* ***individuals'*** *sexual orientation.*

To decide if the statute is constitutional, it must provide sufficient notice of what conduct is prohibited. "A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008). See *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *Commonwealth v. Kash*, 967 S.W.2d 37, 43 (Ky. App. 1997).

Further, the trial court must correctly interpret the provisions of the statute and applied them in a rational way to accurate findings of the facts. To reach that question, the meaning of

the words in KRS 532.031 (1) must be ascertained. KRS 446.080 states, "All words and phrases shall be construed according to the common and approved usage of language, but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in the law, shall be construed according to such meaning." "Where the words used in a statute are clear and unambiguous and express the legislative intent, there is no room for construction and the statute must be accepted as written." *Griffin v. City of Bowling Green*, 458 S.W.2d 456, 457 (Ky. App. 1970).

The statute requires but-for causation- The central phrase in the statute is "because of." "Because of" is not a technical word or one that has acquired a peculiar meaning. That phrase is defined as a preposition that means "by reason of : on account of." http://www.merriam-webster.com/dictionary/because%20of. The Encarta Dictionary: English (North America) defines it as "indicating the reason or cause of something."

Other courts have interpreted hate crime statutes with language similar to Kentucky and their jurisprudence is illustrative. In rejecting an arbitrary or discriminatory enforcement and overbroad application challenge to its statute, the California Court held, "'Because of' is a term in common usage. It connotes a causal link between the victim's characteristic and the offender's conduct, and resembles language found in other civil rights and antidiscrimination statutes." *In Re M.S.*, 896 P.2d 1365, 1375-76 (1995). Reviewing similar statutes, the Court "found no authority holding any of these similar formulations unconstitutionally vague. To the contrary, the Oregon Supreme Court upheld that state's hate crime statute against a vagueness challenge, observing the statute 'expressly and unambiguously requires the state to prove a causal connection between the infliction of injury and the assailants' perception of the group to which the victim belongs.' (*State v. Plowman* (1992)314 Or. 157, 838 P.2d 558, 561, italics in original.)" *Id.* They reasoned that the words "because of" gave "the person of ordinary intelligence a reasonable opportunity to know

what the statutes prohibit." *Id.* at 1376. "[I]t is the causal connection between prejudice and a prohibited action that protects hate-crime statutes from constitutional challenge."

Iowa has a statute very similar to Kentucky.[4] Addressing mixed motivation cases, where the defendant's action is motivated not only by bias but also by another reason such as anger or greed, the Iowa Court determined that "because of" meant that, but for the bias, the defendant would not have acted. Thus, "if a defendant is partially motivated by bias, but would still have committed the acts regardless of the bias, the defendant usually cannot be guilty…" *State v. Hennings*, 791 N.W.2d 828, 835 (Iowa 2010).

The Court of Appeals for the Sixth Circuit recently determined whether defendants committed assaults on fellow members of an Amish community "because of" their religion.[5] In *U.S. v. Miller*, 767 F.3d 585, 591 (6th Cir. 2014), the issue was whether the jury instructions correctly established the standard for the "motive element" of "because of" perceived or actual religion. In *Miller*, members of an Amish community admittedly assaulted other members or friends or former members after the shunning of several families by the community leader. Because of the shunning the leader's daughter lost custody of his granddaughter to the shunned father who had relocated to a Pennsylvania Amish community. The assaults, which consisted of cutting the beards of the men and hair of the women were committed either because they believed the victims were Amish hypocrites and were not practicing their faith correctly- or a mix

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[4] Iowa Code 2 Section 729A.2 defines a hate crime as "one of the following public offenses when committed against a person or a person's property because of the person's race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, or disability." The enumerated list includes assault.

[5] The case was prosecuted under 18 U.S.C. § 249(a)(2)(A), the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009. That Act states: **(2) Offenses involving actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability.--**
(A) In general.--Whoever, whether or not acting under color of law, in any circumstance described in subparagraph (B) or paragraph (3), willfully causes bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempts to cause bodily injury to any person, **because of** the actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person--…[emphasis added]. Unlike Kentucky's statute, this describes a stand- alone criminal offense, not a sentencing enhancement or sentencing factor.

of reasons- "parental mistreatment, personality conflicts, harassment, power struggles, and interference with family relationships." *Id.* The question was whether "because of" meant religion was a "significant motivating factor" for the attacks or it had to be "but-for causation," i.e. the attacks would not have happened otherwise. The Court explained:

> In everyday usage, the phrase "because of" indicates a but-for causal link between the action that comes before it and the circumstance that comes afterwards. John carried an umbrella because of the rain. Jane stayed home from school because of her fever. Dictionary definitions of the phrase reflect this common-sense understanding: "Because of" means "by reason of" or "on account of" the explanation that follows. Webster's Second New International Dictionary 242 (1950); see also Oxford English Dictionary, "because " (2012). Put in the context of this statute, a defendant "causes bodily injury to a [ ] person ... because of [that person's] actual or perceived ... religion," 18 U.S.C. § 249(a)(2)(A), when the person's actual or perceived religion was a but-for reason the defendant decided to act.

The Sixth Circuit pointed out that after the trial in this case, the United States Supreme Court decided *Burrage v. United States*, —— U.S. ——, 134 S.Ct. 881, 887–89 (2014). In *Burrage*, the Supreme Court found that phrases such as "results from", "because of", "based on" and "by reason of" "have been read to impose a but-for causation requirement." *Id.*, 134 S. Ct. at 884, cites omitted. The Sixth Circuit held that "'because of' means what it says: The prohibited act or motive must be an actual cause of the specified outcome." *Miller, supra* at 592.

The Sixth Circuit went on to explain the wisdom of this construction:

> That conclusion makes good sense in the context of a criminal case implicating the motives of the defendants. The alternative proposed definition of the phrase ("significant motivating factor") does not sufficiently define the prohibited conduct. How should a jury measure whether a specific motive was significant in inspiring a defendant to act? Is a motive significant if it is one of three reasons he acted? One of ten? "Uncertainty of [this] kind cannot be squared with the beyond-a-reasonable-doubt standard applicable in criminal trials or with the need to express criminal laws in terms ordinary persons can comprehend." *Burrage*, 134 S.Ct. at 892 (rejecting the "substantial" or "contributing" factor test). Even if there were some doubt over which of these definitions Congress had in mind, which we do not think there is, the rule of lenity would require us to adopt the more lenient of the two in a criminal case. See id. at 891; see also id. at 892 (Ginsburg, J., concurring in the judgment).

Id. Thus, the Court held, "[a]ll roads lead to the same conclusion: For an assault to be a federal hate crime, the victim's protected characteristic must be a but-for cause behind the defendant's decision to act." *Id.* at 594.

The *Miller* court held the instructional error was not harmless because evidence existed that while religious discord was at the core of the disagreements, the attacks were also motivated by the emotions and acts that led to ill-feelings about how one family member was treating another.

This Court must interpret "because of" and "as a result of" consistent with *Burrage, Miller* and the other cases cited above.

The statute requires the offense to be committed against the individual with a protected characteristic listed- A number of phrases in the statute itself make it obvious that the offenses had to be committed against the specific individual or individuals the defendant was biased against. The statute clearly states **an offense** must be committed **as a result of** a hate crime. This is an unambiguous reference that the specific offense charged (which must be one of the enumerated offenses) is committed with the hate crime requirements as its but-for cause. It unerringly follows that if a specific offense is not committed but for the defendant's bias, even if it is close in time or part of a series of offense, it is not a hate crime.

The plain language of Section 1 also requires that the defendant **intentionally** committed the offense **because of** race, color, religion, sexual orientation, or national origin of another **individual or group of individuals.** It requires a specific intent to act, not simply towards a class of persons or because of a hated idea or concept, but against another individual because of bias against her sexual orientation. The legislature's explicit terms evince an intent that the defendant specifically intend to commit the offense against the specific individual with one of the enumerated characteristic.

Logically, the trial court must make a written finding "as to whether the crime was motivated by hate **against one of the classified groups**." Jennifer Jolly-Ryan, *Strengthening Hate Crime Laws in Kentucky*, 88 Ky. L.J. 63, 82 (2000) [emphasis added]. People who are not selected as the victim of an assault because of their race, color, religion, national origin or sexual orientation do not need the protection of a hate crime statute in addition to the protections the Penal Code already provides to every citizen.

It is the selection of the individual assaulted based on certain characteristics that is the harm proscribed. If the victim is not selected because of that characteristic, any rational basis for the statute falls apart. The state has no legitimate interest in providing the extra protection of a hate crime statute to victims of attacks not motivated by bias against them. Any such construction would run afoul of the Equal Protection Clause of the 14th Amendment. See generally *Commonwealth v. Howard*, 969 S.W.2d 700, 703 (Ky. 1998).

Any other construction also violates the Due Process Clause because it fails to give a citizen adequate notice of the behavior it proscribes and renders that statute void-for-vagueness. "Hate crime statutes are vulnerable to challenges based upon the Due Process Clause of the United States Constitution if they are not clearly drafted so as to provide notice of the boundaries of the law. …[T]hey must also clearly define when bigoted behavior will be punished under the law."Jennifer Jolly-Ryan, *Strengthening Hate Crime Laws in Kentucky*, 88 Ky. L.J. 63, 84-85 (2000). "The due process clause requires that a criminal statute give clear notice of what activity is proscribed and provide adequate guidelines to prevent arbitrary law enforcement actions." Anti-Defamation League, *1999 Hate Crime Laws Constitutional Challenges to Hate Crimes Statutes* (visited Sept. 26, 1999) <http:// www.adl.org/99hatecrime/constitutionality.html>.

In fact, other statutes have survived constitutional attacks on over breadth, vagueness and First Amendment grounds because they have been interpreted to require specific intent to attack

specific individuals as opposed to classes or abstract groups. See *In re M.S.*, 896 P.2d 1365, 1371-73 (1995).

Furthermore, "[t]he United States Supreme Court has emphasized the value of a specific intent requirement in mitigating potential vagueness of a statute...." *Id.* at 1376-77, citing *Screws v. United States*, 325 U.S. 91, 101 (1945), other cites omitted. See also *In re Joshua H.*, 13 Cal. App. 4th 1734, 1743, 17 Cal. Rptr. 2d 291, 296-97 (1993) (the hate crime statutes "punish the discriminatory act of selecting a crime victim based on his or her race or other status."); *State v. Stalder*, 630 So. 2d 1072, 1077 (Fla. 1994) (finding a hate crime statute constitutional because it only applies to bias-motivated crimes meaning where the defendant intentionally selects the victim because of the victim's "race, color, ethnicity, religion, or national origin.) Kentucky's statute requires the defendant's intentional act to be because of the characteristics of the individual assaulted. As the Miller Court stated, "the **victim's** protected characteristic must be a but-for cause behind the defendant's decision to act." *Miller, supra* at 594. This Court must recognize that interpretation.

In *People v. Fox*, 844 N.Y.S.2d 627, 633-34 (Sup. Ct. 2007), the New York Court, interpreting a hate crime statute which required the defendant intentionally select the person against whom the offense is committed in whole or in substantial part because of a belief or perception regarding listed characteristics including sexual orientation, held "had the Legislature wanted to require that a hate crime be based on something more than just the intentional selection of the victim because of a particular attribute, it could have done so. That the Legislature limited such offenses solely to instances where a victim of a specified offense is intentionally selected in whole or in substantial part because of a protected trait, is a clear indication of its intent that no other criteria was required in order to sustain such a charge." The same is true of the Kentucky legislature.

The phrase "as a result of" reinforces the concept of but-for causation-Likewise, the trial court also had to find that the assault was committed "as a result of" the hate crime. This wording appears to be redundant but the logical construction is that the hate crime was a but-for cause of the assault.

With these principles in mind, the interpretation of Section 1 of KRS 352.031 by the trial court makes the statute unconstitutionally void-for-vagueness because the court applied it to offenses of which sexual orientation bias was not the but-for cause, and also expanded the scope of the statute to apply it to individuals not intentionally selected because of their protected characteristic. Furthermore, Burke's Due Process rights were violated when the trial court erroneously found that facts adduced at trial supported a finding that all four crimes were hate crimes when the evidence was insufficient to prove that.

1). Katie Meyer Assault 4th Conviction

The Commonwealth, trial court and the Court of Appeals relied heavily on several statements attributed to Burke to prove he intentionally assaulted Katie Meyer because of her sexual orientation. Dee Sprague testified Burke said "fucking dyke" when he got out of the car and slammed the car door. VR 3/15/12; 13:46:25. But it is unclear to whom he directed that comment. Sprague and Ondine Quinn were not the only women present. Erica Abney and Pam Keller had gotten out of the car before Burke and were yelling slurs at the other women. Burke was trying unsuccessfully to get Abney back in the car so they could leave. He could have directed his frustration at Abney and Keller at that point, using a derogatory term to express that frustration, not to literally call either woman a "dyke." Without more evidence, this statement does not make it more likely than not that Burke perceived Dee and Ondine to be homosexual and was biased against them because of that. Burke denied he made the statement. No evidence was admitted that Burke had met either woman before or had any reason to know or believe what their sexual orientation was. See VR 5/17/11; 9:28:00.

Even if that phrase was directed at Dee Sprague and Ondine Quinn, **those women were not the assault victim for the offense of which Burke was convicted**. Katie Meyer and Connie Kohlman, the women ultimately assaulted, were not present at that time, having walked ahead. Burke literally did not know they existed when that statement was made. The "you're gonna run" comment that Dee attributed to Burke as he and Tim Searp subsequently went around the corner was not accompanied by derogatory comments. No evidence showed it was directed at Katie.

It also cannot be inferred that Katie's sexual orientation was the but-for cause of Burke's actions subsequent, i.e. without Katie's sexual orientation they would not have occurred. Again, no evidence was introduced which makes it more likely than not that Burke knew what Katie's sexual orientation was or specifically believed **she** was homosexual. The evidence supports theories that Burke was aggravated at Abney for not getting back in the car and possibly also at Sprague and Quinn for rapping on the trunk of the car. It certainly enraged Erica Abney and Pam Keller. Burke was also in pain. Then Searp started running in the direction of at least one of the women.

Burke denied assaulting Meyer. But at best the evidence supports an inference that Burke may have decided to chase and possibly fight with or assault one or more of the women, not on account of Meyer's sexual orientation but because he was angry, frustrated and following his companions' lead. Defendants commit assaults all the time for those reasons. In fact, Jessica Ladd testified that Pam Keller and the people she was with seemed to be going towards the people they were arguing with, indicating a verbal altercation between two groups of people. The vast majority of crimes have nothing to do with hate crimes but far more common emotions. Even if Burke had mixed reasons for the Katie Meyer assault, sexual orientation bias was not the but-for cause and he did not commit a hate crime. See VR 5/17/11; 9:32:25 et. seq.

Katie also said that the first time she came around the corner Burke ran by yelling things like "fucking dykes" and "clit lickers". Id., 15:10:45. But this was not when the assault of Katie actually happened. It was prior to that and it appeared the men were chasing Ondine, possibly Connie Kohlman. Katie got kicked in the back after she jumped on top of Connie. The inference does not follow that Burke intentionally assaulted Katie Meyer because of her sexual orientation if the comments were not made to her when she was assaulted. Again, it is unclear to whom the comments were directed or that his subsequent actions were intended or solely motivated by any perceived sexual orientation of Katie. In fact, it is more likely than not that Burke assaulted Katie because she came to Connie's defense and got in between her and Burke.

Likewise, even terms that are traditional derogatory terms may not be enough when forming the only basis of the inference a victim was selected for that characteristic. In *In re John V.*, 820 N.Y.S.2d 490, 491-96 (Fam. Ct. 2006), the mere allegation that an alleged teenaged male victim was called a "faggott" by another male juvenile right before he punched him in the nose was insufficient to sustain a juvenile petition that the defendant was motivated, at least substantially, to act because of his belief that the alleged victim was a homosexual.

In addition to the reasons listed above, it is just as likely as not that Burke's comments were intended to intimidate, out of anger or frustration, not to express an intent to assault Katie (or any other woman) solely because of sexual orientation. See e.g. *Freudenberger v. State*, 940 So.2d 551 (Fla. App. 2006) (commission of crime itself must evidence prejudice; the mere exhibition of prejudice during the commission of the crime is insufficient.)

In fact, Dee Sprague said towards the end of the incident, when she saw Burke was walking back in the direction of Katie, she actually put herself in front of him and tapped his chest. She described his eyes as wild, spinning around, looking at everything. Although he had the knife then, he in no way harmed Sprague.

Both the trial court and the prosecutor repeatedly relied on a faulty string of inferences upon inferences that because Burke got out of the car, he got out with the intent to assault the women (who were **NOT** the actual victims) because they were lesbians. TR 268. But these are not fair inferences from the evidence. All five people got out of the car.[6] But the first people yelling at Sprague and Ondine were Erica Abney and Pam Keller. No proof exists that at the time Burke got out of the car, he had seen Sprague or Ondine to form any opinion about their sexual orientation. They were directly behind the car when Ondine rapped on it. The trial court's findings and conclusions were erroneous and insufficient to support a hate crime finding. TR 268.

The same is true of the Court of Appeals' conclusion that " [w]hether Meyer and her female friends were lesbians is not the key. Whether accurate or not, Burke's belief that they were, as expressed by his own words, suggested his intention to act based on sexual orientation and convinced the trial court of his hatred by a preponderance of the evidence." *Burke*, slip op. at 30. The Court of Appeals lumped all the women together even though Burke encountered them at different times and said different things around them and took different actions (or no actions) towards them.

To avoid being impermissibly vague, the statute can only be violated based on evidence that Burke's intentional assault of Katie would not have occurred except for her sexual orientation. The evidence fails to support that finding. Even if Burke was motivated by more than one factor to assault Meyer, one being sexual orientation, the proof would still fail because the motivation was not the but-for cause of the assault.

[6] As defense counsel noted, it is curious and disturbing that Searp was never charged with a hate crime even though he was the first person to hit anyone, hitting Kohlman in the face.

2). Pfeiffer, Patton, Akemon Assault 2d Convictions

Even if this Court finds the Katie Meyer assault was a hate crime, no proof exists that the three assault second degree offenses against Patton, Akemon, and Pfeiffer were. The prosecutor relied on a transferred intent or chain of causation theory that if Burke had not gotten out of the car and assaulted Katie and allegedly Connie, the other three men would not have stopped, intervened and been cut. "But for attack [sic], both physical and verbal, on the lesbian women, the three men who were stabbed would not have been assaulted." TR 245. As defense counsel noted, the basis of the allegation on the three men was solely the assault of Katie Meyer. VR 5/17/11; 9:25:20. The trial court found simply, "The facts demonstrate that [Burke] intentionally left the vehicle to assault women he believed to be lesbians. All his other actions including all of the assaults stem from his intention to harm a person because of their sexual orientation." TR 268.

The Court of Appeals held, "Meyer was Burke's first victim, followed by Pfeiffer, Patton, and Akemon- three men who tried to help. Once the attack began, it did not stop until the police arrived and placed Burke in handcuffs. As found by the trial court, four people were assaulted as a result of Burke's hatred of lesbians. We endorse the trial court's rationale that Burke engaged in a single episode that began with an assault on a woman, and ended with assaults on three men who offered her assistance." *Burke*, slip op. at 30.

Construing the statute to include victims not intentionally selected based solely on the characteristics listed in the statute is contrary to its plain language[7], the rationale of the statute, and makes the statute unconstitutionally vague because there was no way for him to know the statute prohibited such behavior. The statute tells him he has committed a hate crime if his bias against an individual's sexual orientation (or other listed characteristic) is the but-for reason he has intentionally selected that individual to assault. It does not inform him that he can commit a

[7] Defense counsel argued that point to the trial court. VR 5/17/11; 9:25:55.

hate crime if after that alleged assault is completed, he can be held responsible under the same statute for assaults committed on different individuals, at different times and places, none possessing the specified characteristics and none selected for that reason. This flawed construction dramatically increases the number of offenses which could be deemed hate crimes in a way the legislature did not intend and must be explicitly rejected by this Court.

First, if Burke is correct that the Katie Meyer assault is not a hate crime that automatically means the three assault second degrees were not hate crimes either since the argument is they were the result of the Meyer assault. VR 5/17/11; 9: 26:15.

Even if the Meyer assault was a hate crime, it cannot dictate that the other assaults were as well. Id., 9:27:05. No one ever seriously asserted that Burke specifically intended to assault the three men because of their sexual orientation or any of the other protected reasons, as it would have been a ludicrous theory. They were not of the same sex as the women and nothing was said to the men during the assaults from which an inference can be drawn that Burke was motivated as the but-for cause of those assaults by a protected characteristic of any of the men. The hate crime statute cannot and does not allow Burke or any other citizen to be found to have committed a hate crime if the offense was not intended against the victim of the protected classes. Each separate offense has to be intended because of sexual orientation (or other protected characteristic) of the specific individual that was the victim of that offense. Otherwise, the statute is impermissibly vague as to what conduct could be a hate crime. See e.g. *Botts v. State*, 604 S.E.2d 512 (Ga. 2004).

No evidence makes it more likely than not that the three men were assaulted because they were selected for some protected characteristics. Furthermore, the evidence at trial is insufficient to prove that those assaults would have happened as a result of the Katie Meyer assault. The Meyer assault was totally different in character. Burke did not use a knife.. It occurred in a different place, around the corner before the crowd had gathered and the scene grew chaotic.

And the nature of the scene quickly changed in a dramatic way. While the Court of Appeals said there was no testimony at trial that Burke was out of control in a chaotic situation, Burke, slip op. at 30, that is simply not the case. A plethora of evidence was introduced, both by the Commonwealth and the defense that the scene changed radically after the initial encounter with Dee and Ondine and perhaps Connie and Katie. The only possible inference that can be drawn from the witnesses' descriptions of what happened was that chaos ensued and covered different areas, from the Shell gas station, around the corner on Pike Street, in the alley and at the gate by the bank parking lot.

It is undisputed that all of the three men arrived on the scene after the Meyer assault was over. Burke testified he was in pain, he was afraid of being hit because of his fragile medical state, he did not know why the men were coming at him, two of them were armed, one was bigger than him, one jumped on him and he acted out of fear to defend himself. Even discounting Burke's testimony, the Commonwealth's witnesses described the scene repeatedly using words such as commotion and chaos, with screaming and a crowd growing from different directions converging in Pike Street. Katie and Connie described the initial encounter with Erica and Pam as "commotion" with the women yelling and in Dee's face. Dee said two dozen people gathered after the assault of Connie and Katie. People were shouting and running around and Burke ran across the street. Patton described commotion and screaming. Jessica Ladd said Burke looked mad. Dee Sprague said his eyes were wild, spinning around, looking in different directions. Pfeiffer said he saw screaming and fighting- there were two dozen people in the middle of the street and it was pandemonium.

The evidence does not even support the finding that the men stopped to help Katie. Pfeiffer stopped to help the women; he was worried his sister was in the fight.
This is not a mixed motive case. Burke's motivation to select the three men had nothing to do with their sexual orientation. It was the opposite of the but-for cause of the attacks. Even if

somehow a transferred intent theory could be entertained, the evidence here does not support it. The evidence shows only that once Burke's initial encounter with the women ended, a crowd grew and engaged him, causing him to cut three men, either because of self-defense, imperfect self-defense or he was being challenged and "mad" and "wild."

2. Even if the hate crime factor was met, the proof is insufficient that it was the primary factor in any of the assaults.

This requirement listed in Section 2 of KRS 532.032 is problematic given the cases holding that "because of" means but-for causation, not simply a significant or even primary factor for the crime. It also appears to be redundant to the "as a result of" language in Section1. "The primary purpose of judicial construction is to carry out the intent of the legislature. [cites omitted]. In construing a statute, the courts must consider 'the intended purpose of the statute—the reason and spirit of the statute—and the mischief intended to be remedied.' *City of Louisville v. Helman*, Ky., 253 S.W.2d 598, 600 (1952). The courts should reject a construction that is "unreasonable and absurd, in preference for one that is 'reasonable, rational, sensible and intelligent'".... *Johnson v. Frankfort & C.R.R.*, 303 Ky. 256, 197 S.W.2d 432, 434 (1946) (citation omitted). In addition, the courts must construe statutes in a manner that saves their constitutionality whenever possible consistent with "reason and common sense." [cite omitted]. *Commonwealth v. Kash, supra* at 43-44. This Court should read both sections of the statutes together in harmony and hold that "primary factor" means the hate crime was the but-for cause of the commission of the offense.

Even the plain meaning of the word "primary" supports that construction. The Encarta Dictionary: English (North American) defines "primary" as "most important," or "first in sequence."

Assuming *arguendo* that bias towards sexual orientation was one factor in Burke's assault of Katie Meyer, there is no proof it was the primary or most important factor. A one-sided or

mutual screaming match, depending on whose testimony one believes, had already begun between Erica and Pam and Dee and Ondine after Ondine rapped on the trunk of the car. If Burke's primary motive was intimidating the women, regardless of sexual orientation, or he had concurrent motives for the assault, such as pain, anger and frustration over the situation that was turning chaotic, then it is not a hate crime. See *State v. Hennings*, 791 N.W.2d 828 (Iowa 2010). As defense counsel argued, Erica and Pam getting out and yelling was the primary thing that got the ball rolling. VR 5/17/11; 9:34:20.

Regarding the assault second convictions, the statute plainly says the sentencing judge shall determine a hate crime was a primary factor **in the commission of THE crime**. As argued earlier, the only common sense construction of this language is that the hate crime has to be found to be the most important factor in the commission of each individual crime, not to any other crime that might have happened first. There is no proof sexual orientation was any factor at all in the assault on each man.

Again, the Court of Appeals failed to analyze each requirement of the statute and address Burke's arguments that hate was not the primary factor of each individual assault. The nature of the encounter had changed significantly from when Searp and Burke ran after the women. A crowd gathered from different directions. People who were not present when the first encounter occurred entered the fray armed with deadly weapons and approached Burke. At least two of the men were armed when they confronted Burke- whether this results in perfect self-defense, it logically supports a reasonable inference of evoking different emotions and motivation for Burke's actions towards them than whatever his original motivation was towards Katie Meyer.

B). No proof of sexual orientation of any victim

The prosecutor never proved the sexual orientation of anyone Burke encountered. The statute by its plain language requires that proof come from the trial, and cannot be construed otherwise. See *Griffin v. City of Bowling Green*, 458 S.W.2d 456, 457 (Ky. App. 1970). There is a

disturbing assumption at sentencing based on the appearance of one witness that some or all of the women were lesbians but no proof was introduced at trial to confirm this. VR 5/17/12; 09:08:30.[8] Dee Sprague said there people of all types including sexual orientation at Meyer's party. VR 3/16/12; 13:29:24. The people walking in three groups from Meyer's party were not all women. Id., 13:34:55. There was nothing inherently homosexual about their appearance or behavior (as if there could be inherently homosexual looks or behavior).

Kentucky's statute does not specify whether the victims of the crime must actually possess the characteristic that is hated or whether the defendant actually knows whether they possess that characteristic. The Court of Appeals felt that the actual characteristic of the individual would not be relevant and only what the defendant believed was true would be important. In short, if a defendant assaulted a person because he believed he was Jewish, why should matter whether he is in fact Jewish?

The problem lies within the plain language of the statute. Other states have included language such as "actual or perceived" to cover situations where a defendant believes a victim is sexually oriented a certain way whether it is actually true or not. See e.g. Ala.Code 1975 § 13A-5-13 (b); Cal.Penal Code § 422.55; C.R.S.A. § 18-9-121(2) (Colo.); C.G.S.A. § 53a-181j (a) (Conn.); DC ST § 22-3701 (1) (.DC.); 720 ILCS 5/12-7.1 (a) (Ill.); LSA-R.S. 14:107.2 (La.); N.R.S. 193.1675 (1) (Nev.); N. M. S. A. 1978, § 31- 18B-2 (D); McKinney's Penal Law § 485.05 (N.Y.); 18 U.S.C. § 249(a)(2)(A). For example, see Fla. Stat. Ann. § 775.085 (3) ("It is an essential element of this section that the record reflect that the defendant perceived, knew, or had reasonable grounds to know or perceive that the victim was within the class delineated in this section.") Kentucky chose not to do that. The plain language of the statute says the defendant intentionally because of sexual orientation of another individual committed assault.

[8] Yet Burke was never charged with assaulting Connie Kohlman, to whom the prosecutor appears to be referring.

Even if the language can be viewed as ambiguous (which it cannot), "Kentucky case law has long recognized that when there is an ambiguity or conflict in a penal statute, the 'rule of lenity' is applicable." *Commonwealth v. Landergan*, 847 S.W.2d 729, 731 (Ky. 1993). Thus, doubts about the meaning of the hate crime statute should be resolved in favor of Burke so as to avoid a harsh or incongruous result. This Court should interpret the statute to require proof of the sexual orientation of the victim.

The Commonwealth must prove that the defendant believes the individual possesses one of the enumerated characteristics. While it introduced several statements by Burke to argue he believed the women were homosexual, no proof existed that he believed the three men were.

The Court of Appeals did not address the statutes cited by Burke which, unlike Kentucky, demonstrate by their express language that perceived as well as actual inclusion in the protected class, such as sexual orientation, can form the basis of a hate crime. Rather, it held, without analysis or support, that "there is no requirement that the actor's motivation be accurate, only that it prompted him to act." *Burke*, slip. op. at p. 30. But if no proof is offered that the persons attacked reside in the protected class, the basis for believing the defendant's actions are motivated by hate of those people falls apart. Despite the words that might be used by a defendant, those words are less probative of bias motivation if they are not directed towards persons known to be within that class.

C. Burke was entitled to pre-trial notice that a hate crime is alleged-

Burke argued in his written objection that due process requires notice of the nature and cause of the accusation against an accused. 5th, 6th and 14th Ams., U.S. Const.; Sec. 11, Ky. Const. TR 250.

Burke was entitled to pre-trial notice of the hate crime allegation in the indictment. "No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." *Lankford v. Idaho*, 500 U.S.

110, 121-122 (1991). But even if an indictment was not required, reasonable notice is guaranteed by the Due Process right to be informed of the nature and cause of the accusation brought against him. 5th, 6th, 14th Ams., U.S. Const.; Sec. 11, Ky. Const.

"The indictment must contain an allegation of every fact which is legally essential to the punishment inflicted." *Apprendi v. New Jersey*, 530 U.S. 466, 498 fn. 15 (2000). While the hate crime statute does not increase the statutory maximum Burke faced, it did affect his ability to make parole. Id., 09:12:54. While parole is a privilege in Kentucky, the Supreme Court has rejected the right-privilege distinction and has held that probationers and parolees have a sufficient liberty interest in their conditional liberty to merit constitutional protection. See *Morrissey v. Brewer*, 408 U.S. 471 (1972). Where additional punishment is involved, Kentucky requires reasonable pre-trial notice, usually in the indictment. See *Jackson v. Commonwealth*, 20 S.W.3d 906 (Ky. 2000) (PFO); KRS 439.3401 (violent offender); *Soto v. Commonwealth*, 139 S.W.3d 827, 843 (Ky. 2004) (aggravating circumstances to seek death penalty.)

A prior case implies hate crimes should be charged in the indictment. See *Hendrix v. Commonwealth*, 2005 WL 2107648 (Ky. App. 2005)[9] (indictment indicated arson would be charged as hate crime under KRS 532.031; trial court found arson was not a hate crime at sentencing). See Appendix Tab 3.

Even if specific notice in the indictment was not mandated, reasonable pre-trial notice was required for Burke to have an opportunity to defend himself against the prosecutor's motion to declare these hate crimes. "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." *In re Oliver*, 333 U.S. 257, 273 (1948).

[9] The Court of Appeals questioned Burke's citation to *Hendrix*. But *Hendrix* is cited not as binding precedent but as an illustration for how this issue has been viewed by another Commonwealth Attorney. It demonstrates that at least one other prosecutor believed the hate crime allegation should be presented to a grand jury.

Due process requires notice and an opportunity to be heard. *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Pendleton v. Commonwealth*, 83 S.W.3d 522, 528 (Ky. 2002). Burke's due process right to a fair trial was violated. Without reasonable pre-trial notice Burke was deprived of his Due Process right to present a complete and meaningful defense. See generally *Crane v. Kentucky*, 476 U.S. 683, 690 (1986); *Brown v. Commonwealth*, 313 S.W.3d 577, 624-25 (Ky. 2010); *Beaty v. Commonwealth*, 125 S.W.3d 196 (Ky. 2003).

The statute mandates that the evidence used for the hate crime finding comes from the trial. KRS 532.031 (2). If Burke had known what the prosecutor planned, he may have made different decisions about trial strategy. The value and necessity of adequate notice allowing counsel's presence if the accused is to have a fair opportunity to present a defense at the trial itself is deeply ingrained in our jurisprudence. See *United States v. Wade*, 388 U.S. 218, 224 (1967) (right to presence of counsel at post-indictment line-up); *Massiah v. United States*, 377 U.S. 201 (1964) (incriminating statements obtained by conversation arranged by government without notice to defendant's counsel); *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Miranda v. Arizona*, 384 U.S. 436 (1966).

Burke's counsel could have provided more assistance had he received timely notice of the hate crime allegation. The defense did not know to object to the photo of Burke showing his tattoos because the prosecutor would use that to argue this was a hate crime. He might have questioned the state's witnesses more thoroughly about their lack of relationship to each other. He might have elicited specific evidence from Burke himself about his motivations, and his beliefs about who the different groups of men were and how they were related to the group of people they first encountered when the car backed up. Likewise, counsel could have asked questions of the male victims to underscore their observations of Burke's behavior and why Burke assaulted them. Burke might have chosen to forego trial and accept a plea bargain, assuming his chance at parole would be lessened for hate crimes. TR 252-3.

The Court of Appeals stated nothing prevented Burke from introducing proof that if the crimes were found to be hate crimes, the parole board could deny parole. *Burke*, slip op. at 28. Burke agrees with the Court of Appeals' conclusion that this would be relevant information which Burke would have been allowed to introduce in the penalty phase. However, to say Burke could have introduced evidence in anticipation that the Commonwealth would prove something at sentencing it had given no notice it would prove is illogical, and Burke's attempts to do would likely have been prevented by the trial court. The trial court's anticipated response would be that the evidence was irrelevant until the Commonwealth gave notice it would ask that a hate crime be proven. This approach also requires the defendant to introduce a damaging concept to the jury, i.e. the idea that the legislature potentially designated Burke's acts as a hate crime, before knowing if it was necessary to do so to counter the Commonwealth's assertion these were hate crimes. There is no evidence that Burke made a calculated decision not to defend against the hate crime designation during the presentation of evidence at the trial.

There was at least tacit misdirection by the Commonwealth on the hate crime issue. The defense filed a motion in limine to exclude references to statements made including "homo", "faggot," and "you fucking dikes." TR 67. He argued, "Though the statements are discriminatory, the alleged offense was not charged as a hate crime, the elements of which are governed by specific laws." TR 69. The prosecutor filed a written response, arguing they were relevant to show motive for what precipitated the acts, but never once mentioned she planned to ask that the court designate this as a hate crime after trial. TR 108-9.

The trial court's finding that Burke was "very aware" that the Commonwealth believed this was a hate crime is belied by the above evidence to the contrary. VR 5/17/11; 09:59:00. While counsel may have been aware that the prosecutor thought Burke was a hateful person, "hate crime" is a term of art and the designation requires certain findings under the statute. Just as the notice required for other crimes and bad acts under RCr 404 (c), broad knowledge by

defense counsel that evidence is out there is not sufficient to serve as notice the prosecutor intends to use that evidence to ask for a specific finding by the court. *Daniel v. Commonwealth*, 905 S.W.2d 76 (Ky.1995). See e.g. *State v. Francis*, 809 So.2d 1029, 1032 (La. App. 2001). Only then does the defendant have a fair opportunity to meet that accusation.

Because Kentucky's hate crime statute is relatively unique, to counsel's knowledge, there are no cases directly on point addressing pre-trial notice of the Commonwealth's intent to prove a hate crime.

The Court of Appeals' conclusion that Burke was aware of the existence and potential applicability of KRS 532.031 because Burke sought to exclude mention of the term hate crime is refuted by the argument above. The Court of Appeals' conclusion that "Burke made a calculated decision that ultimately failed" is not supported by the record. To find otherwise accuses impugns the integrity of defense counsel who appeared to be earnestly trying to find what the prosecutor intended to present and defend against that.

The trial court also ruled that the Kentucky Constitution does not require jury sentencing and the hate crime designation was not an element of the crime. VR 5/17/11; 09:59:00. However, Kentucky law provides a broad right to jury sentencing under both KRS 29A.270 (1), KRS 532.055 (2), RCr 9.84(1), and RCr 9.26. "Clearly, under Kentucky law a criminal defendant has a statutory right to have his sentence set by a jury." *Wilson v. Commonwealth*, 765 S.W.2d 22 (Ky. 1989). The Court of Appeals concluded that the hate crime designation is not a sentencing factor because it "potentially impacts only the amount of time actually served, not the length of the sentence imposed." *Burke*, Slip op. at 28. But the amount of time actually served is just as important a liberty interest as the length of sentence assessed. A defendant who receives a 17 year sentence but is paroled after 20% and who gets credit for time served on parole is free for a longer period of time than a defendant who receives a 10 year sentence but is never probated or paroled. Also, the designation that Burke committed a hate crime, appearing prominently in the

final judgment, will follow him forever. Being a convicted felon is damaging- having a reputation for attacking people because one hates their status is repugnant. It would be disingenuous to believe the Parole Board would feel any differently.

The Court of Appeals was concerned that it would place the Commonwealth in a bind to require it to give notice prior to indictment when the facts that support that finding might not be fully known. However, that it the position the Commonwealth is always in and the remedy is to amend the indictment, seek a superseding indictment or provide a Bill of Particulars giving sufficient notice before the case is tried to allow the defense an opportunity to prepare for trial.

D. The jury should be told about the effects of parole eligibility on a hate crime.

The jury heard extensive evidence at sentencing about parole, good time credit, minimum parole eligibility, PFO, concurrent and consecutive sentencing, etc. VR 3/16/11; 20:13:50 et. seq. Yet it did not hear that if Burke's offenses were hate crimes, the Parole Board could deny him parole based on that factor. This was one of the consequences of lack of pre-trial notice by the Commonwealth.

This evidence would have been admissible under KRS 532.055(2)(a)(1). "It is recognized policy, in furtherance of justice, to provide full and accurate information to a sentencing jury." *Offutt v. Commonwealth*, 799 S.W.2d 815, 817 (Ky. 1990). Courts have reversed for re-sentencing when juries are given inaccurate evidence about sentencing factors because of the effect that evidence may have had on the jury's choice of sentence. See *Robinson v. Commonwealth*, 181 S.W.3d 30, 38 (Ky. 2005) (good time credit); *Lawson v. Commonwealth*, 85 S.W.3d 571 (Ky. 2002) (sentencing range); *Floyd v. Commonwealth*, 2009 WL 736002 (Ky. 2009) (parole and probation eligibility). See Appendix Tab 4. In effect, the jury received inaccurate evidence about parole because a significant piece of whether parole would be considered was withheld. What it heard was an incomplete, skewed picture of parole.

The jury heard from Burke's mother about his horrific childhood, how his past reckless homicide conviction when he was 18 happened, and how he was taught his attitudes about race. The jury appeared to take the evidence it heard about parole, prior record and mitigation and made a very conscious choice of how it all fit together for a proper sentence of 17 years. This calculation could have tilted towards a lesser sentence had the jury known Burke's chance for parole might be foreclosed or lessened by a hate crime designation. Burke should have the opportunity to argue that point to the jury in asking for a lesser sentence.

Burke request that this Court issue an opinion that makes it clear that under KRS 532.055 this would be admissible evidence relevant to parole eligibility as well as potentially mitigating evidence. He also requests that this Court vacate his sentence and remand for a new sentencing hearing in which this evidence can be presented.

E. The jury must decide whether a crime is a hate crime beyond a reasonable doubt.

Burke argued that under *Apprendi, supra*, and *Jones v. Commonwealth*, 526 U.S. 227, 243 (1999), a jury should have decided whether this was a hate crime beyond a reasonable doubt.[10] While the language of KRS 532.031 (3) and (4) permits but does not mandate that a trial court deny probation or the Parole Board deny parole, it still allows either or both parties to deny the defendant his liberty because he was found to have committed a hate crime. The hate crime statute increases the likelihood Burke will remain incarcerated when he might otherwise have been released because it decrease the opportunity to be paroled. Extending periods of parole ineligibility is a punitive measure meant to enhance the punishment of the serious offenses. *Commonwealth v. Pridham*, 394 S.W.3d 867, 878 (Ky. 2012) (finding IAC for misadvice on parole consequences). The factors required to transform an assault into a hate crime should have been

[10] The prosecutor argued that *Soto, supra*, held that Kentucky does not follow *Apprendi*. That is not the case. See *Dixon v. Commonwealth*, 263 S.W.3d 583, 590 (Ky. 2008).

presented to a jury. Therefore, the statute is unconstitutional and violates due process. 5th,14th. Ams., U.S. Const.; Sec. 11, Ky. Const.

F. Remedy-

The hate crime statute was interpreted and applied as to render it unconstitutionally vague, and in the case of the assault second degree convictions, without a rational basis related to any legitimate state interest. The evidence introduced at trial and the findings of the trial court were insufficient to support findings either that Burke "intentionally because of … sexual orientation" violated "a provision" of KRS 508.020 and 508.040; **and** "a hate crime was a primary factor in the commission of the crime." That portion of the judgment must be vacated for insufficient evidence. If the Court agrees with Burke on any of his other arguments concerning pretrial notice and jury sentencing, his convictions should be reversed and a new trial ordered.

2. A myriad of irrelevant, prejudicial evidence denied Burke a fair trial.

Preservation- This issue is preserved with cites to the record set out below, save for Burke's First Amendment claim. That should be reviewed under RCr 10.26. RCr 10.26 provides unpreserved error may be reviewed on appeal if it is "palpable" and "affects the substantial rights" of a defendant, resulting in "manifest injustice." See *Schoenbachler, supra*; see also KRE 103(e). Relief under this provision is appropriate when "manifest injustice has resulted from the error," where such error is clear or plain under current law. *Brewer v. Commonwealth*, 206 S.W.3d 343 (Ky. 2006). Reversal is required when palpable error affects the fairness, integrity, or public reputation of the proceeding so as to be "shocking or jurisprudentially intolerable." *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006). This constitutional error is plain- the law leaves no doubt about it. See *Brewer, supra*. The First Amendment right to speak one's mind is a substantial right and it is a manifest injustice for a trial court to arbitrarily curtail that federal constitutional right.

A. Introduction-

A myriad of evidence and questions injected into this trial subjects which were irrelevant, more prejudicial than probative and encouraged the jury to convict Burke for his character rather than what he did or did not do on the day of the crime. His right to a fair trial under the Due Process Clause and his First Amendment right to free speech and expression were violated. This projected the message Burke was guilty and dangerous almost from the moment the trial began.

B. Irrelevant, unduly prejudicial evidence and evidence of bad character/other crimes is inadmissible-

Evidence which is not relevant in not admissible. KRE 401, 402. Even relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, …" KRE 403. A person's character trait is not admissible to prove the defendant acted that same way on a certain occasion, unless the defendant offers evidence of his general moral character. KRE 404(a) (1). This general rule applies equally to witnesses, with certain exceptions. KRE 404 (A) (3). "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show conformity therewith," unless exceptions are proven. KRE 404 (b), 404 (b) (1). See also *Billings v. Commonwealth*, 843 S.W.2d 890, 892 (Ky. 1992). To introduce evidence under KRE 404(b), the trial court must ask if it meets a well-established three part test: (1) is the evidence relevant; (2) does it have probative value; and (3) is its probative value substantially outweighed by its prejudicial effect. *Bell v. Commonwealth*, 875 S.W.2d 882, 889-91 (Ky. 1994).

1. Photo showing Burke's swastika tattoo-

The defense made a motion in limine to prevent the jury from being shown a photo of Burke exposing various tattoos because they were not relevant, were inflammatory, offensive and he would be convicted based on the tattoos. VR 2/14/11, 16:24:00; TR 79-84. The court ruled the prosecutor could show the unredacted picture to witnesses to identify Burke from that night

and could publish the photo to the jury. VR 3/15/11; 08:01:15, 08:05:50, 08:06:20. The prosecutor, over objection, introduced a photograph of Burke's upper body (Exhibit 4). See Appendix Tab 5. A large swastika is plainly visible on his upper left arm, along with numerous other tattoos. VR 3/15/11., 13:42:00.

The prosecutor showed the photo to Dee Sprague, the first witness, and she identified it as Burke. VR 3/15/11; 13:42:50-13:43:32. Burke renewed his objection that it wanted the photo redacted and not published to the jury. The court overruled, saying the photo could be published quickly. Id., 13:42:12-13:42:42. The jury was shown the photo. Id., 13:43:40.The prosecutor showed the same photo to Connie Kohlman who identified Burke; the photo was again shown to the jury. Id., 14:41:45. During Katie Meyer's testimony, the defense objected to continuing to show the photo to the jury, arguing this was duplicative and defeated the court's ruling. Id., 15:09:25. The court allowed the photo to be shown a third time to the jury.

Using the unredacted photo violated the above Kentucky rules as well as Burke's right to free speech under the 1st Amendment and a fair trial under the Due Process clause of the 14th Amendment and Section 11 of the Kentucky Constitution.

The central issues are: 1) the **exact nature of Burke's tattoos** which was irrelevant to any material issue at trial, and 2) the **extreme prejudice of the tattoos,** especially the swastika.

Burke had not placed evidence of his good character in evidence when the photo was shown to the jury. Burke's expressions through his tattoos do not make the existence of any fact concerning whether Burke assaulted the four alleged victims, or whether he acted in self- defense, more or less likely. The witnesses at trial did not identify Burke specifically because of the swastika tattoo but because he was heavily tattooed. The Court of Appeals even found, "Witnesses described the two men differently, but all agreed the heavily tattooed man inflicted the knife wounds and stood over Meyer when she was kicked in the back." *Burke*, slip op. at 33.

Burke did not dispute he was heavily tattooed and Searp was not. The photo gave the jury a much closer, clearer view of the tattoos than the witnesses would have seen that night.

The swastika tattoo did not prove identity. Burke admitted cutting Pfeiffer, Patton and Akemon, claiming self-defense, even if he disputed assaulting Katie Meyers. But Meyer only identified the man she saw as having a lot of tattoos.

The tattoos do not show motive. In fact, whatever the prosecutor's theory was during sentencing about why Burke was attacking the women, the prosecution was very concerned at the start of the trial that the jury not be told it had to prove Burke's motives for the attack.[11]

The prosecutor repeated what it called Burke's hateful statements- "Fucking dykes. You gonna run, you little bitch"- at the start of her opening statement. Id., 12:55:24. The clear message was these were homophobic slurs. But a swastika does not give rise to an inference of homophobia. A direct inference about what the swastika does "say" is elusive but generally could infer religious, racial or national origin bias. See *Hicks v. Commonwealth*, 2009 WL 3526699, at 8 (Ky. Oct. 29, 2009) (unpublished) (argument that swastika tattoo of witness relevant to show racial animus towards African Americans rejected "because no other evidence was presented- either direct or circumstantial in character-which tended to show what Spence's swastika tattoo meant to him, why he chose to have it placed on his body, or whether he had any particular feelings, negative or positive, towards African-Americans or any ethnic group at all.") See attached at Appendix Tab 6.

The photo was not relevant to rebut any claim Burke was injured himself because he never at any time made such a claim.

The photo could have been omitted all together. But more importantly, the swastika could have been covered or blurred. This was an ideal balancing of the interest of the Commonwealth to prove its case and the right of Burke to not be convicted based on irrelevant,

[11] VR 3/15/11; 9:57:30-10:05:00.

unduly prejudicial evidence of bad character. This solution would not have altered the basic appearance of Burke but would have prevented an unfair and extremely damaging attack on his character.

In *Dawson v. Delaware*, 503 U.S. 159 (1992), the Supreme Court held it violated Dawson's 1st and 14th Amendment rights to read a stipulation to the jury in the penalty phase of a trial telling them the Aryan Brotherhood was a white racist supremacy gang that began in a California prison and had chapters in many state prisons including Delaware, and to introduce evidence Dawson had Aryan Brotherhood tattooed on his hand. The Court found the evidence had no relevance to the issues being tried. It said nothing about the Delaware group's beliefs. The victim and Dawson were both white and no racist motive was tied to the crime. It did not rebut any mitigation presented by Dawson. Dawson was free under the federal constitution to make whatever associations he wished and hold whatever beliefs he wanted.[12] Burke had the same rights under the First Amendment and Section 8 of the Kentucky Constitution.

In *Brown v. Commonwealth*, 313 S.W.3d 577 (Ky. 2010), a photo of the defendant came in to show scratches but also showed various tattoos which the prosecutor cross-examined Brown about. The Court found error, noting that evidence can be excluded under KRE 403 if it unduly prejudicial, i.e., "'if it will induce the jury to decide the case on an improper basis, commonly an emotional one, rather than on the evidence presented.' *United States v. Thomas*, 321 F.3d 627, 630 (7th Cir. 2003) (citations and internal quotation marks omitted)." *Brown, supra* at 619. Even though the prosecutor did not question Burke or comment about the swastika, the tattoo in *Brown* contained only a rude gesture, while Burke's tattoo represented a polarizing, highly inflammatory and emotional symbol. "The tattoo evidence was not relevant to any material issue, but merely tended to suggest, … that Brown was the sort of angry, disaffected person capable of murdering Sherry Bland." *Brown, supra* at 619. Thus, the Commonwealth violated KRE 404(b).

[12] The Court of Appeals did not address the Dawson case or Burke's First Amendment claim.

Evidence that the defendant had tattoos unrelated to identity and suggesting he was in a gang, violated KRE 404(b). *Colyer v. Commonwealth*, 2009 WL 736001 (Ky. 2009). See Appendix Tab 7. See also *State v. Steele*, 510 N.W.2d 661 (S.D.1994). "It is also error if evidence of a tattoo is used to establish that the defendant acted in conformity with the message of the tattoo." *Bolick v. Delo*, 912 F.Supp. 1199 (W.D.Mo.1995), rev'd nom *Bolick v. Bowersox*, 96 F.3d 1070, 1071 (8th Cir.1996)." *Id.* at 5.

While Burke's swastika tattoo should have been excluded under KRE 404(a) and (b), clearly it was inadmissible under KRE 403. The Court of Appeals' holding the probative value of the photo far outweighed its prejudice is clearly erroneous. *Burke*, slip op. at 35.

Few symbols in the past century evoke more emotion than a swastika. Showing he had chosen a swastika- a symbol for a political doctrine known for the extermination of those unlike its members- would encourage jurors to convict Burke because his character was to hate others unlike himself and to approve of violence. A picture is worth a thousand words. This symbol is not one which needed comment to extract a negative meaning. Speculation about the different meanings of the tattoo- all negative- could have been improperly used to find Burke acted in conformity with the tattoo. The jury saw the photo numerous times, not just one fleeting glance. The prosecutor used the photo of the swastika to argue this was a hate crime. VR 5/17/11; 09:07:55.

In *Floudiotis v. State*, 726 A.2d 1196, 1204 (Del. 1999), the Court held that the probative value of photos taken immediately after defendants' arrest showing t-shirts with inflammatory images (the lynching of a black man) and tattoos depicting swastikas and Nazi troops was minimal but the prejudice was substantial. "These had no relevance to identification or to the theory of the crime and served only to inflame the passions of the jury. These images, at least implicitly, labeled the defendants as white supremacists." Id.

The same is true in Burke's case. Any probative value related to identity was easily cured by redacting the photograph to cover the swastika. Instead, Burke appeared to be a hateful man, not just a man who directed a few derogatory words at women that evening.

2. Crail pill bottle and arrest of Clark for its possession, the green handled knife, and drug dog alert-

Burke filed a motion in limine to exclude any reference to a pill bottle with the name Stacy Crail on it and a green handled knife, both found in Charles Clark's white Firebird, because they were irrelevant, more prejudicial and confusing than there were probative, and were also improper character evidence. TR 73-77. Burke also objected to Clark being questioned about his arrest for possessing the pill bottle.

During Officer Bradbury's testimony, the prosecutor tried to ask if he was familiar with Charles Clark. VR 3/16/11; 12:30:50. The defense objected, reminding the court of his motion in limine. The prosecutor said she would use it on rebuttal and the court sustained the defense objection. Id., 12:32:00.

Officer Lusardi testified he brought his drug dog to the scene. Id., 13:15:00. Burke renewed his motion in limine, objecting to mention of anything found in the car, and the dog alert because it indicated drug activity. Id., 13:04:10. The court overruled the objection, saying the fact the officer had a reason to get in the car was relevant. Id., 13:06:52. The officer then testified his dog assisted in searching the outside of the car and he got a signal to search the inside. Id., 13:07:35. He searched and found a green knife in the center console. Id., 13:07:50. A photo of the knife was admitted as Exhibit 10, over defense objection. Id., 13:08:50. The green knife itself was admitted as Exhibit 11. Id., 13:09:57.

Burke called Charles Clark to testify in his defense case. During cross, the prosecutor asked if he was arrested for things found in his vehicle. VR 3/17/11; 10:41:00. Burke renewed his motion in limine. Id., 10:41:15. The prosecutor argued since Clark testified, his credibility was at

issue so his arrest for possession of pills with Crail's name in his car was relevant. Id., 10:41:30. The court said it was part and parcel of his choosing not to go away and overruled the objection. Id., 10:42:05. The following exchange then occurred:

> Comm.- You got arrested for possession of some pills.
> Clark- Yes.
> Comm.- They were in somebody named Stacy Crail, in her pill bottle that night?
> Clark- Yes.
> Comm.- That was found right next to the driver's side, your seat…
> Clark- Yeah, I think he did say it was…
> Comm.-… right between the seat and your car door?
> Clark- Yes, I thought he said in between the seat and console.
> Comm.- Did you use any of those pills that night?
> Clark- No.
> Comm.- Do you know what pills were in that bottle?
> Clark- He told me they was Xanax's. [Whose he?] The officer.
> Comm.- You did not know they were in your car?
> Clark- No.
> Comm.- Did you see anyone get in your car who had possession of that pill bottle and drop it in there?
> Clark- No. Three weeks before this happened, I loaned the car to Stacy. She was supposed to get it back ….
> Comm.- So she might have dropped them in there?
> Clark- She got arrested over in Cinci and I had to get my car out.
> Comm.- So that might have been where they came from?

Id., 10:42:15.

The presence of Crail's pill bottle in the car, Clark's arrest for it, and the alert of the drug dog on the car were wholly irrelevant to any material issue at trial. This evidence was not connected to Burke personally except he happened to be a passenger in Clark's car. Crail had nothing to do with this incident. Neither the ingestion of, nor the possession of, drugs had anything to do with the assaults. Introduction of all this evidence was a blatant violation of KRE 401, 403 and 404(b). The Commonwealth's argument this was relevant to Clark's credibility as a witness fails. KRE 608 limits attacks on the credibility of witnesses through character evidence to either opinion or reputation for truthfulness, or specific instances of conduct concerning the witness' character for truthfulness. Clark's possession and arrest fall under neither exception. The fact that the pill bottle was in his car was not probative of his truthfulness.

The trial court did not analyze the *Bell* factors before allowing evidence of Clark's arrest into evidence. Whether Clark chose not to go away was not relevant to whether Burke committed the charged assaults. Clark did nothing wrong that night regarding the women in the initial encounter or the men who were cut. Regardless, the pill bottle and Clark's arrest made it no more likely that he chose to stay around or not. The defense had not offered any evidence of Clark's good character. Making Clark look like he illegally possessed another people's prescription drugs hurt the credibility of one of the few witnesses who supported Burke's testimony that Patton got out of the white van with the hammer, was waiving it over his head, and approached Burke first, saying, "Come on, come on, you want some of me." Id.,10:30:40,10:32:15. This evidence also allowed the jury to speculate that Burke associated with drugs users.

The Court of Appeals correctly found the trial court erred in allowing the admission of Clark's arrest for possession of Crail's pill bottle. *Burke*, slip op. at 36. However, the Court of Appeals held the error was harmless because Clark offered a plausible explanation- that he lent his car to Crail several weeks earlier and she left the bottle there. Id. at 37. But this analysis fails. Clark's story was not so plausible that it kept the police from arresting him that night. The prosecutor also used the arrest in her closing as evidence that Clark, along with Searp, were the ones who got in trouble that night because they were arrested for alcohol intoxication and possession of pills, as opposed to Katie Meyer and Dee Sprague who were not arrested. VR 3/17/11; 15:24:42.

The Court of Appeals held that the drug dog search was relevant to show why the interior of the car was searched (*Burke*, slip op. at 36) but this is circular logic. Having held that evidence of the pill bottle was irrelevant, how the police got to the pill bottle was equally irrelevant. Burke was not charged with any drug offense.

The green handled knife was equally irrelevant yet prejudicial. The police never believed the knife was involved-they believed Burke had a brown handled knife and threw it at the scene.

VR 3/1711; 08:17:10, 08:20:25. A brown folding knife was found in the Shell lot. Burke confirmed this in his testimony. The green handled knife was not even tested by the police. Introducing it could serve only to confuse the jury and improperly add to its portrayal of Burke as a violent man.

The Court of Appeals held that the knife was relevant to show why Clark did not drive away after Patton emerged with the hammer. Clark never said that was why he stayed and it defies logic that he would have stayed and retrieved a small knife for protection when no evidence exists that he actually picked up the knife.

3. Questions designed to illicit several female witnesses did not want to give their addresses-

The prosecutor asked Dee Sprague, the first witness, if she was comfortable giving her address; she said no. VR 3/15/11; 13:25:00, 13:28:00. Burke objected that the implication was they were afraid of Burke. The court overruled, saying they are considering themselves victims because of the incident as a whole. Id., 13:26:45, 13:28:25. Burke said the proper remedy was that nobody asks the question. The prosecutor asked Sprague if it was fair to say she was uncomfortable giving her address because of the circumstances about this case. She said yes but said she lived in Cincinnati. Id., 13:28:44.

Katie Meyer, the third witness, was asked if she felt comfortable stating whether she lived in the tri-state area. VR 3/15/11; 15:01:45. After a defense objection, the prosecutor asked if she would tell the jury where she lived. Id., 15:01:59. The defense objected that the prosecutor only asked because she knew the witness would answer no. Id., 15:02:15. The court allowed the question. The prosecutor asked Meyer if she was willing to tell the jury where she lived, and she responded "not exactly." Id., 15:02:36.

The court abused its discretion by allowing this questioning. The witnesses' addresses were neither an element of the offense nor relevant to any material issue at trial. The only

purpose of the question suggesting the female witnesses were afraid of Burke. Nothing about this crime, as opposed to others, made this a "special circumstance" except the willingness of the prosecutor and court to signal to the jury that these women needed special protection because Burke was dangerous and thus guilty.

The Court of Appeals found this questioning to be harmless. *Burke*, slip. op at 37. It also suggests that it is not unusual for a witness not to want to give an address in open court. Then the prosecutor should determine that ahead of time and refrain from asking the questions- especially of several witnesses- in open court. The prosecutor's words infer this error was invited. The prosecutor did not ask the witnesses to state their addresses but asked if they were comfortable giving their addresses. This suggested the answer was no.

C. Prejudice under Kentucky Law-

Errors based on state law are analyzed for prejudice as follows: "[t]he inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." *Crossland v. Commonwealth*, 291 S.W.3d 223, 233 (Ky. 2009).

All the evidence set out above, individually, or as a whole, had a substantial influence on the verdict and thus there is grave doubt about the verdicts, especially the assault second degree convictions, as well as the sentences.

Substantial evidence supported Burke's self- defense claim. It was uncontroverted that Burke had had extensive facial reconstruction surgery days before. Clark supported Burke's story that Patton came at him with the hammer first. Meyer changed her story to the police about how many men approached her in her second interview after lunching with Kohlman. VR 3/15/11; 15:15:00 et. seq. Even though they disputed Burke's version of when events occurred, Pfeiffer

admitted he took his shirt off, as Burke claimed, at some point. Patton testified he was armed with his hammer Thor and Akemon was armed with a knife.

Even if the jury would not have acquitted Burke under perfect self-protection, it could well have found a lesser offense under an imperfect self-defense theory. But Burke was portrayed as advertising Nazi symbols on his body, hanging around with a person with illicit drugs and weapons in his car, and being so menacing that the women called to testify in open court did not want to reveal their basic personal information.

This irrelevant, prejudicial evidence substantially affected Burke's sentence. He got 17 years- close to the maximum 20 year sentence. In particular, the swastika, coupled with his prior conviction for violating civil rights, suggested to the jury Burke should be given a long sentence because he had a hateful character. The trial court said different people see that symbol differently. No one sees a swastika in a positive light.

D. Federal Due Process Violation

When a state court admits evidence "so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the 14th Amendment provides a mechanism for relief." *Payne v. Tennessee*, 501 U.S. 808, 825 (1991). A defendant is entitled to have his guilt adjudged based on reliable evidence. See also *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Estelle v. McGuire*, 502 U.S. 62 (1991); and *Ege v. Yukins*, 485 F.3d 364 (6th Cir. 2007) (unreliable bite-mark evidence violated Chambers and due process). See also *Michigan v. Bryant*, 131 S.Ct. 1143, 1162 n. 13 (2011).

The irrelevant and extremely inflammatory evidence erroneously admitted, especially the photo of the swastika tattoo, was so unduly prejudicial as to deprive Burke of a fair trial under the Due Process Clause of the Fourteenth Amendment. The Commonwealth cannot prove that these errors, alone or taken as a whole, were harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18 (1967).

E. Conclusion

Neither harmless error standard can be met in Devlin Burke's case and this Court must reverse. 1st, 14th Am. U.S. Const. and Ky. Const. §§ 2, 8 and 11.

3. The Instructions were confusing and invited a non-unanimous verdict.

This issue is arguably partially preserved. Burke tendered a self-defense instruction on imperfect self-defense. TR 148. He also requested "stand alone" instructions and a wanton assault fourth instruction. VR 3/16/11, 15:45:25, 15:28:11; TR 149. He pointed out the flaw that the jurors would stop with the assault second degree and not consider imperfect self-defense. VR 3/17/11; 10:05:55. The trial court has a duty to instruct the jury on the whole law of the case. *Taylor v. Commonwealth*, 995 S.W.2d 355, 360 (Ky.1999). See also RCr 9.54(1). Burke urges review under RCr 10.26. The insufficient evidence issue should be reviewed pursuant to *Schoenbachler v. Commonwealth*, 95 S.W.3d 830 (Ky. 2003).

The instructions contained fatal flaws which denied Burke his right to due process of law under the 14th. Am., U.S. Const., and Sec. 2, 11, Ky. Const. Because of the length of the instructions, they have been placed in the Appendix Tab 8.

A. Assault second degree and self- protection instructions-

A person who subjectively believes that the use of force is necessary to protect himself, but is either reckless or wanton in that belief, is entitled to instructions on KRS 503.120(1). *Elliott v. Commonwealth*, 976 S.W.2d 416, 420 (Ky. 1998). The mistaken belief is so unreasonable as to be wanton or reckless. *Id.* These instructions did not correctly express the law of self-protection and misled and confused the jury, denying Burke his right to have the jury consider fourth degree assault based on imperfect self- defense. Neither the assault second instructions (TR 215, 217, 219) nor the general self-protection instruction (TR 214) alerted the jury that if it rejected perfect self-defense for assault second degree, it must still consider the elements of imperfect self-defense, and it **MUST** go on to consider the assault fourth degree.

Burke is aware that the pattern instructions on assault second appear similar to the murder instructions approved in *Commonwealth v. Hager*, 41 S.W.3d 828, 833 (Ky. 2001). But the pattern instruction on self-defense in *Hager* included a description of imperfect self-defense, unlike the one given in Burke's case. If the jury here had been given either a self-defense instruction that included imperfect self-defense or a companion instruction that explained that concept, as was tendered, TR 148, or had been told at the bottom of the assault second instruction to proceed to the assault fourth instruction, it would have been clear it could consider whether the facts fit imperfect self-defense. "[I]n addition to the perfect self-protection instruction, the trial court should have also attached an imperfect self-protection instruction to the first degree assault charge.... Because the trial court declined to attach an imperfect self-protection qualifier to the first-degree assault instruction, the jury was not permitted to fully consider Appellant's claim of self-defense." *Hodge v. Commonwealth*, 2006 WL 2708535, 5 (Ky. 2006). See Appendix Tab 9.

The same error occurred here. The jury would naturally stop deliberating once it believed Burke intentionally caused a physical injury with a deadly weapon or dangerous instrument and was not privileged to act in (perfect) self-defense. This deprived Burke of his right to have the jury consider a valid defense provided by Kentucky law, rendering his trial fundamentally unfair under the due process clause of the 14th Amendment. *Fritts v. Lucy*, 469 U.S. 387, 400-401 (1985). The jury may have decided Burke was not entitled to an acquittal on perfect self-defense but believed he had a mistaken belief for self-defense and thus was partially justified in his conduct. The instructions given provided no "third option" for the jury. See *Beck v. Alabama*, 447 U.S. 625 (1980).

Considering the number of offenses and the complexity of the instructions as a whole, the mere fact that the verdicts listed included mistaken belief in the right to self-protection does

not mitigate this error. That still did not tell the jury how to get to assault fourth under the mistaken self-defense theory.

B. Assault fourth degree instruction-

The court found Burke was entitled to assault fourth both as a lesser included offense because the jury could doubt the knife was a deadly weapon/dangerous instrument under KRS 508.030 (1)(a), **and** due to a reduced mental state based on imperfect self-defense. But the instruction which covered both theories was so confusing as to deprive Burke of his right to have the jury consider these theories independently. TR 216, 218, 220. If the jury believed Burke caused physical injury (A) while acting intentionally (B1) and was not entitled to act in self-defense (C1), all the elements of assault fourth would be met. But under the instruction given, the jury could have also considered whether Burke was mistaken in his belief in his need to protect himself (C2-wanton language), including whether he was mistaken and the knife was a deadly weapon/dangerous instrument (C3-reckless). This instruction does not make it clear the jury could find assault fourth **solely** if it doubted the folding knife used was a deadly weapon or dangerous instrument.

The jury was given two choices of mental states- intentional (B1) and reckless (B2) and had to find one to move on, but after that was forced to decide either Burke did not act in self-defense OR he acted wantonly[13] in imperfect self-defense (C2) or recklessly with a deadly weapon/dangerous instrument (C3). This resulted in the jury being forced to find both an intentional and wanton or reckless behavior simultaneously. This misstates the law of imperfect self-defense which does **NOT** require an intentional mental state. The instruction improperly mixed elements of the lesser based on the knife and the lesser based on imperfect self-defense. The assault fourth instruction omitted a mental state applicable to imperfect self-defense-wantonness. The jury was also never directly instructed it could find Burke guilty of wanton

[13] The terms wanton and reckless are not actually used in the C1 and C2 parts of the instruction.

fourth degree assault because of imperfect self-defense. The jury was forced to choose an intentional or reckless mental state before considering imperfect self-defense.

This could have been avoided by giving separate instructions on all theories of assault fourth degree and then for committing assault fourth degree by virtue of imperfect self-defense. It could have also been avoided by giving one of the pattern instructions suggested in Cooper and Cetrulo, *Kentucky Instructions to Juries*, Sec. 11.10 (5th ed. 2011) on assault fourth which includes a specific instruction that the defendant was acting wantonly **as described in C2**, specifically tying the mental state to the corresponding imperfect self-defense description set out below. The same would be repeated for the reckless theory.

As the Court of Appeals notes, the Appellee concedes the instruction was erroneous but argues it was harmless. *Burke*, slip op., at 41. The Court of Appeals found this error did not meet the palpable error standard because the likelihood of the jury believing Burke's self-defense claim was "nil." *Burke*, slip op. at 42. The Court's reasoning was that before he attacked the three men, he attacked Katie Meyer.

The flaw in this analysis is that the incident had changed in nature by then- the crowd had grown and new people, including the three men, had entered the fray from different directions. Unlike Meyer, two of those men were openly armed with deadly weapons. Each man confirmed some portion of Burke's version- i.e. Pfeiffer said he took off his shirt; Burke said the man took his shirt off while approaching Burke; Sizemore saw Patton swing at Searp. The Commonwealth never disputed Burke's testimony that he was medically very fragile and had good reason to fear being struck in the face.

C. Non-unanimous verdict/insufficient evidence pocket knife was deadly weapon/dangerous instrument-

Both the assault second and fourth instructions were fatally flawed because they invited non-unanimous verdicts by combining two theories in one instruction when they were not

supported by the evidence. *Boulder v. Commonwealth*, 610 S.W.2d 615, 617 (Ky. 1980), overruled on other grounds by *Dale v. Commonwealth*, 715 S.W.2d 227 (Ky. 1986). See also *Commonwealth v. Whitmore*, 92 S.W.3d 76, 81 (Ky. 2002); Sec. 7, Ky. Const.; RCr 9.82(1). Furthermore, Burke has a right to a majority verdict under the 6th and 14th Amendments of the federal constitution. *Burch v. Louisiana*, 441 U.S. 130 (1979).

The knife was not a dangerous instrument. The legislature specifically included a knife in the definition of a deadly weapon. KRS 500.080 (4) (c). Kentucky supports "expressio unius est exclusio alterius," or express mentioning of one thing implies the exclusion of others. *George v. Commonwealth*, 885 S.W.2d 938 (Ky. 1994). See also *Commonwealth v. Harris*, 59 S.W.3d 896, 900 (Ky. 2001), where it was held that "enumeration of particular items excludes other items that are not specifically mentioned." Knives were enumerated as deadly weapons, ergo they are not also dangerous instruments.

Even if the knife could be a dangerous instrument, the evidence is insufficient to prove the knife is a deadly weapon. Ordinary pocket knives are specifically is excluded from KRS 500.080(4)(c) but that term is not defined. "Pocketknife is defined as 'a knife that has one or more blades that fold into the handle and that can be carried in the pocket.' Merriam-Webster's Collegiate Dictionary (10th ed.1993). Ordinary is defined as of a kind to be expected in the normal order of events: Routine, Usual.' Id. From these definitions, we infer that the legislature's intended definition of an 'ordinary pocket knife' was: A type of knife that has one or more blades that fold into the handle that can be carried in the pocket, and which is of the usual and routine kind of knife carried in the pocket expected to be observed in the normal order of events." *Brown v. Commonwealth*, 2003 WL 22520434, 2 (Ky. App. 2003). See Appendix Tab 10. The proof reveals Burke's knife was a pocket knife. It was small, it folded, it fit in a pocket, and it appeared to have utility blades on it. See Exhibit 12. The Commonwealth did not prove this element beyond a

reasonable doubt and if any jurors believed the knife was a deadly weapon, Burke's due process rights were violated.

Conclusion- Lesser-included offenses represent a defense to the higher charge and must be considered to prevent the defendant from being denied a legitimate defense. *Hopper v. Evans*, 456 U.S. 605 (1982). *Cf., Slaven v. Commonwealth*, 962 S.W.2d 845, 856 (Ky. 1997). The Due Process Clause also prevents a defendant from being convicted unless the prosecutor proves his guilt of every essential element beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970). Erroneous instructions to the jury are presumed to be prejudicial; an "appellee claiming harmless error bears the burden of showing affirmatively that no prejudice resulted from the error." *McKinney v. Heisel*, 947 S.W.2d 32, 35 (Ky.1997). See also *Harp v. Commonwealth*, 266 S.W.3d 813, 818 (Ky. 2008). There could be no greater injustice than having instructions which prevent the jury from fully considering the defendant's defenses or invite conviction on less than proof beyond a reasonable doubt on every essential element.

4. Improper restriction on right to present a defense.

This issue is preserved. Charles Clark testified on direct that Burke got out of the car after the man with the hammer started towards them. VR 3/17/11; 10:31:15. The prosecutor elicited that Burke got out in response to the man with the hammer. Id., 10:37:50. On re-direct, Clark said he was afraid of the hammer, afraid someone would get hurt. Id., 10:43:55. The prosecutor, on re-cross, asked if they got out of the car to confront him in spite of that, and Clark said yes. Id., 10:44:35. The trial court excused Clark but defense counsel said he had another question. The trial court told him no, he had to approach and tell her what his question was because she usually did not allow re-re-direct. Id.,10:45:00. Burke said the prosecutor's question if he got out of car to confront was misleading as to what his previous testimony was, and it was confusing because Clark never testified anyone got out and went after these people. Id., 10:45:10. The trial court said he could argue that in closing. Id., 10:45:30.

The defense called Clark by avowal and asked him if were they ready to confront these men when they exited the car. Clark replied, "Not really confront them but we just all got out because he was wanted to start trouble and we was just going to find out what he was…" Id., 10:50:30. His intention was not to get out to fight them. Id., 10:50:35.

Burke was denied his due process right to present a defense by the trial court's arbitrary restriction on his ability to question his own witness about a topic introduced by the prosecutor on re-cross-examination. Burke was entitled defend himself by calling witnesses in one's own behalf. *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). Whether Burke and the others got back out of the car to actually **confront** the man with the hammer was different than what Clark had previously said about getting out **in response** to the man with the hammer. Confrontation connotes an intention to be aggressive, not merely getting out to see what the man with the hammer was doing. Defense counsel's question was not duplicative and was in direct response to the prosecutor's re-cross. Burke's defense was self-protection and the jury was instructed Burke was not justified to use physical force if he was the initial aggressor. TR 214. Therefore, any misleading inference that he was the aggressor was prejudicial to Burke's sole defense. The trial court abused its discretion by denying Burke the right for his jurors "to have the benefit of the defense theory before them so that they c[an] make an informed judgment as to the weight to place" on the evidence. *Davis v. Alaska*, 415 U.S. 308, 317 (1974). Reversal is required. 14th. Am., U.S. Const.; Sec. 2,11, Ky. Const.

Conclusion- Devlin Burke requests that this Court reverse his convictions.

Respectfully Submitted,

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